IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.758 OF 2006

Vimalchand Ghevarchand Jain & Ors. .. Appellants.
Vs.
Ramakant Eknath Jajoo .. Respondent.

Mr.V.A.Sugdare for the appellants.
Mr.R.D.Soni i/b M/s.Ram & Co. for the respondent.

CORAM : D.B.BHOSALE, J.
DATED : 20TH FEBRUARY, 2007

P.C.:

. Heard learned counsel for the parties.

2. The concurrent judgments of the courts below, dismissing a suit instituted by the appellants for possession, are under challenge in the instant second appeal. The courts below on appreciation of the evidence on record held that the plaintiffs failed to prove that a sale deed dated 29.6.1978 was an out and out sale transaction. A categoric finding has also been recorded that the said document was executed as security to the amount of hand loan of Rs.50,000/- and it was not intended to be acted upon as sale deed conferring title on the plaintiffs. The contention of the plaintiffs that the respondent-defendant’s father was occupying the suit property as a licensee from 1.1.1978, that is, after execution of sale deed, and he had agreed to pay storage charges of Rs.1,257.50

per month has also been negatived. The appeal court in paragraphs 44 and 45 of the judgment has enumerated the circumstances in favour of both the parties and thereafter proceeded to record its finding. I have gone through the judgments of the courts below as also the other material placed before me by the learned counsel for the appellant.

3. Mr.Sudgare, learned counsel for the appellant-plaintiff vehemently submitted that the provisions of section 91 of the Indian Evidence Act were overlooked by the courts below while interpreting the document against the other evidence on record. In support of this contention he relied upon judgment of **Roop Kumar Vs. Mohan Thedani AIR 2003 Supreme Court 2418**. He submitted that the "best evidence rule" will have to be applied in the present case while determining the nature of transaction dated 29.6.1978 as against the oral evidence led by the respondent-defendant. The recitals of the document coupled with the fact that the possession was handed over to the appellant clearly show intention of the parties to execute out and out sale and it was not money transaction as alleged by the defendants. He then submitted that the case of money transaction or execution of the document by way of security or that the sale deed was not intended to be acted upon was

not pleaded in the written statement and keeping that in view the courts below have committed grave error of law in dismissing the suit instituted by the appellant for possession.

4. It is true that initially such defence was not raised in the written statement, however, in the first appeal the amendment of the pleadings was sought and it was allowed by the court and by way of the amendment the respondent-defendant raised such contentions. The order of allowing the amendment was not challenged by the appellant in further proceedings. In view thereof the submissions of Mr.Sugdare, learned counsel for the appellant that in the absence of substantive pleadings the courts below have committed error in entertaining the plea that the sale deed was not intended to be acted upon and it was a money transaction must be rejected.

5. The submission of Mr.Sugdare based on the judgment of the Supreme Court in **Roop Kumar** (supra) also deserves to be rejected outright. It is true that under section 91 of the Evidence Act, oral evidence against the terms of contract is not permissible, but to this provision exception is made out by section 92 which allows such oral evidence as per the third proviso thereto. It is well settled,

that a plea that title has not passed on the execution of the sale deed can be raised to rebut the contents of the document and intention of the parties behind executing the document can be gathered from the recitals in the document or by other attending circumstances. It is thus clear that from the circumstantial evidence if it is inconsistent with the recitals of the document, it is open for the court to infer that the contents of the document are rebutted. This is what exactly the courts below have done. Taking overall facts and circumstances of the case into consideration, in my opinion, the courts below have rightly held that the document was not intended to be acted upon and it was executed by way of security. I find no reason to interfere with the findings of fact. I find sufficient material on record to sustain those findings. In the circumstances the appeal deserves to be rejected. Order accordingly.

(D.B.Bhosale, J.)